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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-928

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, ET AL.,
PETITIONERS

v.

WILLIAM WAYNE JUSTICE, U.S. DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 31(b)-39) is reported at 516 F.2d 480.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1975 (Pet. App. 31(b), 38). A timely petition for rehearing and suggestion of rehearing

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en banc was denied on October 6, 1975 (Pet. App. 40). The petition for a writ of certiorari was filed on December 31, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in denying a petition for a writ of mandamus which contended that "the trial court abuse[d] its discretion when it permitted the United States to intervene" (Pet. App. 33) under Rule 24(b), Fed. R. Civ. P., in a civil rights suit alleging widespread deprivations of the constitutional rights of inmates in the custody of the Texas Department of Corrections.

RULE AND STATUTES INVOLVED

The pertinent provisions of Rule 24(b), Fed. R. Civ. P. are set forth at Pet. 3.

18 U.S.C. 241 provides:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; * * *

"They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life."

18 U.S.C. 242 provides:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, * * * shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

STATEMENT

Petitioners [1] seek review of the denial by the court of appeals of their "Application for A Writ of Mandamus And/Or Other Extraordinary Relief." The application sought to prevent further participation by the United States as plaintiff-intervenor, or as *amicus curiae* with full rights of a party, in *Ruiz* v. *Estelle*, No. 5523, E.D. Tex. (Pet. App. 34).

Ruiz was initiated more than three years ago by eight inmates of TDC who filed individual complaints under 42 U.S.C. 1983 complaining that their constitutional rights had been violated in several ways and asking for declaratory and injunctive relief (Pet. App. 33). Pursuant to Rule 42(a), Fed. R. Civ. P., the district court consolidated the complaints into a single civil action (Pet. App. 33). The court of ap-

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[1] Petitioners are the Director of the Texas Department of Corrections ("TDC") and the Chairman and members of the Texas Board of Corrections (Pet. 1, n. 1).

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peals summarized the amended allegations as follows (*id.* at 33, n. 1):

> It alleges that the TDC subjects inmates to cruel and unusual punishment (by inadequately providing for their personal security and safety, by failing to provide minimally adequate medical care, and by forcing them to live and work under unsafe conditions), and that the TDC deprives its inmates of Due Process of Law by interfering with their access to lawyers and the courts (by impeding communications and punishing such communications).

After holding that the case could proceed as a class action (*id.* at 33), the district court ordered the United States to participate in the case as an *amicus curiae* "with the full rights of a party" (*id.* at 1-2). The United States conducted initial pretrial discovery in its capacity as *amicus curiae*, and then filed a motion with the court to intervene as a party plaintiff pursuant to Rule 24(b)(2), Fed. R. Civ. P. (Pet. App. 11). The district court granted the United States' motion on December 6, 1974 (*id.* at 25), and ordered its complaint in intervention (*id.* at 13-24) filed. Thereafter the United States commenced substantial pretrial discovery (*id.* at 33).

On January 30, 1975, petitioners moved to dismiss the United States as plaintiff-intervenor and as *amicus curiae* (*id.* at 34). Following a hearing, the court denied petitioners' motion and declined to certify an interlocutory appeal under 28 U.S.C. 1292 (b) (*ibid.*). Petitioners then filed a "Petition for A Writ of Mandamus and/or Other Extraordinary Re-

lief" in the court of appeals, contending that "the trial court abuse[d] its discretion when it permitted the United States to intervene in *Ruiz*" (Pet. App. 33).

A panel of the court of appeals denied the petition (Pet. App. 38), and a petition for rehearing and suggestion of rehearing *en banc* was also denied (Pet. App. 40). The court held that petitioners had failed to establish that any substantial hardship or irreparable harm would result from observing the established rule of reviewing such interlocutory orders on appeal from the final judgment (*id.* at 35-36, 39). The judges, however, differed slightly on other reasons why they believed mandamus was inappropriate. Judges Tuttle and Morgan found no abuse of discretion by the district court that would justify thwarting the congressional policy against piecemeal appeals (*id.* at 35). Judge Godbold, concurring, stated that he thought the question was not one of abuse of discretion, but rather whether as a "matter of law * * * the United States had the requisite interest to satisfy Rule 24" (*id.* at 38-39). He reasoned that mandamus is not available here because the district court's decision, even if erroneous, "was not so egregious as to constitute a usurpation of power" (*id.* at 39).

Judge Tuttle reached the merits of whether the district court erred in permitting the United States to intervene pursuant to Rule 24(b)(2). He concluded that the district court acted within its discretion because the United States had a "claim" in common with the plaintiffs within the meaning of

Rule 24(b)(2)[2] (Pet. App. 38). That "claim" is based on the "scope and mandate of the protection guaranteed by analogous criminal statutes [18 U.S.C. 241, 242]" which authorize the United States to bring criminal actions against persons acting under color of law who deprive others of rights secured by the Constitution and laws of the United States (*id.* at 37-38). Because it is "extremely doubtful that criminal penalties would be effective, or even fully adequate" in the present situation (*id.* at 37), Judge Tuttle, relying on *Wyandotte Co.* v. *United States*, 389 U.S. 191, concluded that the United States may seek a civil remedy in order to ensure the full effectiveness that Congress intended (Pet. App. 38).[3]

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[2] Rule 24(b)(2) provides, in pertinent part: "Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common."

Because Judge Tuttle found that participation by the United States fell within the express language of Rule 24(b)(2), it was unnecessary for him (Pet. App. 36) to reach the other two grounds relied upon by the United States: (1) inherent authority to participate in litigation affecting its interest (see, *e.g.*, *In re Debs*, 158 U.S. 564); and (2) general statutory authority for such participation provided by 28 U.S.C. 517, which says, in part: "The Solicitor General, or any other officer of the Department of Justice may be sent by the Attorney General to any State or district in the United States to attend to the interest of the United States in a suit pending in a court of the United States, or in a court of a State * * *."

[3] Applications for stays of the judgment were denied by the court of appeals (Pet. App. 41) and by Mr. Justice Powell (Pet. App. 42).

ARGUMENT

The court of appeals correctly held on this record that the district court's order allowing permissive intervention by the United States should not be reviewed on an interlocutory application for relief in the nature of mandamus.

Congress established a strong policy against piecemeal review in 28 U.S.C. 1291, which limits the courts of appeals to review of final judgments. This policy is subject to carefully limited exceptions, which are not applicable, ~~and~~ or were not invoked, in this case.[4] Petitioners cannot avoid this firm rule of finality by seeking review of interlocutory orders under the guise of mandamus. That extraordinary writ is reserved for really extraordinary causes. *Will* v. *United States*, 389 U.S. 90, 107; *Ex parte Fahey*, 332 U.S. 258, 259-260. It is neither a substitute for appeal nor a device to control the exercise of discretion by the district courts. *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383.

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[4] Petitioners proceeded ~~only~~ by petition for mandamus or like relief. Interlocutory injunctions and certain non-final orders relating to receiverships, admiralty and patents are appealable under 28 U.S.C. 1292(a). Interlocutory orders certified as involving a controlling question of law whose appeal may substantially advance disposition of the litigation can be permitted by a court of appeals under 28 U.S.C. 1292(b). In addition, *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546, recognizes that certain preliminary orders may be final for purposes of appeal where substantial rights affected by an interlocutory order cannot be preserved for appeal from the final judgment. An order simply allowing permissive intervention fits none of these categories.

See p. 4, supra

A request for permissive intervention under Fed. R. Civ. P. 24(b), in contrast to a claim for intervention as of right under Rule 24(a), is addressed to the district court's sound discretion. Wright and Miller, *Federal Practice and Procedure: Civil*, § 1913 (1972).[5] The legal basis for the exercise of that discretion may ultimately be challenged on appeal from the final judgment, but not until then, because an order granting permissive intervention is interlocutory. *Van Hoomissen* v. *Xerox Corp.*, 497 F. 2d 180 (C.A. 9).[6]

Petitioners contend (Pet. 15-17), nevertheless, that mandamus is available in this case because the district court's order permitting intervention by the United States is said to exceed the court's jurisdiction so grossly as to amount to a willful usurpation of power. *Schlagenhauf* v. *Holder*, 379 U.S. 104. But it is well established that a district court has discretion to permit intervention by the United States under

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[5] See, *e.g.*, *Hodgson* v. *United Mine Workers*, 473 F.2d 118, 125, n. 36 (C.A. D.C.); *Nuesse* v. *Camp*, 385 F.2d 694, 706 (C.A. D.C.); *Edmondson* v. *Nebraska*, 383 F.2d 123 (C.A. 8); *Springer* v. *Best*, 264 F.2d 24 (C.A. 9); *Manufacturers Trust Co.* v. *Kelbey*, 125 F.2d 650, 655 (C.C.A. 2), certiorari denied, 316 U.S. 697.

[6] See, *e.g.*, *Zito* v. *Tesoriero*, 239 F. Supp. 354 (E.D. N.Y.); *Herter* v. *Helmsley-Spear, Inc.*, 149 F. Supp. 713 (S.D. N.Y.); *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972 (D. Mass.); *Mutual Chemical Co. of America* v. *Mayor and City Council of Baltimore*, 33 F. Supp. 881 (D. Md.).

Rule 24(b).[7] Bare assertions of error in the exercise of that discretion do not establish a usurpation of jurisdiction. *Will* v. *United States, supra,* 389 U.S. at 104.

Petitioners' argument rests on a single proposition: by providing for certain types of participation by the Attorney General in civil rights litigation, Congress is supposed to have intentionally denied the United States any other basis on which to assert a claim or defense involving a question of law or fact common to a private civil rights action. Aside from petitioners' confusion of authority under the Civil Rights Act of 1964, 78 Stat. 241, as amended, 42 U.S.C. 1971, *et seq.*, to bring original actions (*e.g.*, 42 U.S.C. 1971(c), 1973(b) and (c), 1973j(d) and (e), 2000e-6, 3613), to intervene as of right (42 U.S.C. 2000h-2), and to intervene permissively (*e.g.*, 42 U.S.C. 2000a-3(a) and 2000e-6), they misapprehend the operation of Rule 24(b)(2).

Rule 24(b) provides for permissive intervention in three distinct circumstances: 1) when a statute confers a conditional right to intervene; 2) when the applicant's claim or defense and the main action

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[7] There is no substantial liklihood that petitioners' objection to the permissive intervention of the United States in this case would become moot upon appeal from the grant or denial of final relief. The United States would be an appellee in any appeal noticed by petitioners, and they could specifically challenge its intervention. If the United States or the original plaintiffs appeal, petitioners may challenge the United States' intervention by a timely cross-appeal under Fed. R. App. P. 4(a). See Wright and Miller, *Federal Practice and Procedure: Civil,* § 1923 (1972).

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have a common question of law or fact; or 3) when a government officer or agency seeks to intervene because a party relies on a statute or regulation the officer or agency administers. The absence, in a particular case, of an express statute authorizing permissive intervention under the first clause of the rule obviously does not foreclose intervention under the other two, or they would be empty surplusage. Nor, contrary to petitioners' contentions, do concepts of standing developed for determining the justiciability of private constitutional challenges to governmental action apply when the government intervenes to assert a public interest under the second clause. Rule 24(b)(2) "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *Securities and Exchange Commission* v. *United States Realty Co.*, 310 U.S. 434, 459. See also *Nuesse* v. *Camp*, 385 F. 2d 694, 705-706 (C.A. D.C.).[8]

Congress has recognized that the law provides a broad basis for intervention by the government to

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[8] In *United States Realty, supra*, a government agency was permitted to intervene in an arrangement proceeding under Chapter XI of the Bankruptcy Act, despite the absence of express authority for permissive intervention under that Chapter. The intervention was permitted so that the agency could assert the public interest in having the parties proceed by reorganization under Chapter X. Thus petitioner's reliance on such "private standing" cases as *Warth* v. *Seldin*, 422 U.S. 490, *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, and *United States* v. *Richardson*, 418 U.S. 166, is beside the mark.

assert public interests. In the Civil Rights Act of 1964 it expressly provided, in addition to that Act's specific authorizations of original suits and intervention as of right or by permission, that "[n]othing in this Act shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General or of the United States or any agency or office thereof under existing law to institute or intervene in any action or proceeding." 42 U.S.C. 2000h-3.

Under this provision, and Rule 24(b)(2), the United States demonstrated a substantial basis for intervention on the ground that the main action here involved questions of law or fact common with the legal responsibilities of the United States. The United States has statutory responsibility for enforcing 18 U.S.C. 241 and 242, the criminal counterpart to 42 U.S.C. 1983, the statute on which the original action is based. See *United States* v. *Price*, 383 U.S. 787, 794 and n. 7.[9] As Judge Tuttle observed (Pet. App. 38):

> [T]he United States was entitled to seek civil relief * * * based on the scope and the mandate of the protection guaranteed by analogous criminal statutes [18 U.S.C. 241, 242], and thus that the "claim" of the United States, within the meaning of Rule 24(b)(2), F.R.Civ.P., was not

[9] The responsibility of the United States to protect the rights secured by the Constitution is no less broad than its responsibility to protect interstate commerce from obstruction (*In re Debs*, 158 U.S. 564, 581-582), the public lands from fraud (*United States* v. *San Jacinto Tin Co.*, 125 U.S. 273), or the integrity of the patent system (*United States* v. *Bell Telephone Co.*, 128 U.S. 315, 367).

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> only "common" but identical to that asserted by the original *pro se* plaintiffs. Consequently, the trial court acted within the "sphere of [its] discretionary power" in permitting the United States to intervene permissively pursuant to the Rule (footnote omitted).

For correction of widescale abuses in a state correctional system, criminal sanctions are obviously "inadequate to ensure the full effectiveness of the statute which Congress had intended," *Wyandotte Co.* v. *United States*, 389 U.S. 191, 202. The United States may therefore seek a civil remedy to ensure the full effectiveness of the statutory guarantees of civil rights. Cf. *id.* at 204; see also *United States* v. *Republic Steel Corp.*, 362 U.S. 482, *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33; *J. I. Case Co.* v. *Borak*, 377 U.S. 426.[10] This rationale alone provided a sufficient basis for permitting intervention subject to ultimate review on appeal from the final judgment, where, as here, the subject of the original actions involves the constitutional rights of all inmates in a large state prison system.[11]

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[10] Cf. *United States* v. *Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D. N.Y.); *United States* v. *City of Shreveport*, 210 F. Supp. 36 (W.D. La.); *United States* v. *Brittain*, 319 F. Supp. 1058 (N.D. Ala.).

[11] Neither *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, nor *New York Times Co.* v. *United States*, 403 U.S. 713, bears on whether the court of appeals should have granted mandamus. *Youngstown* involved direct executive seizure of private property, to prevent a nationwide strike, without any statutory authority to act. In *New York Times* the government sought an injunction which would have

In any event, petitioners are not threatened with an irreparable injury so great as to warrant extraordinary relief. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30-31; *United States Alkali Assn.* v. *United States*, 325 U.S. 196. Petitioners' real complaint is that they will be subject to effective discovery if the United States participates. But this is not significant, for "the other parties plaintiff unquestionably have the identical right, though possibly not the same means and manpower, to pursue discovery" (Pet. App. 39). Thus, as the court of appeals correctly held (Pet. App. 35):

> * * * the expense and inconvenience of a trial as a prerequisite to review has been held not to justify the issuance of mandamus without more. * * * [M]oreover, the claim of hardship of which petitioner complains here is either unexceptionable or premature. It is unexceptionable because it is no more than the full and vigorous discovery that a large system-wide class action anticipates. * * * [T]he petitioner's complaint as to the scope and cost to him of the discovery sought by the United States is premature, because the trial court has yet to rule on the petitioner's motions

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imposed a prior restraint on publication of government documents. The Court held only that the government had not met the First Amendment's heavy burden of justification for a prior restraint. In contrast to *New York Times*, participation by the United States as a party in this case will help secure, rather than infringe, rights guaranteed by the Constitution which Congress has sought to protect through 42 U.S.C. 1983, and 18 U.S.C. 241 and 242.

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to limit and prevent certain aspects of the inquiries proposed by the United States.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1976.

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[12] Petitioners also contend that it was error for the district court to allow the United States to participate earlier in this litigation as *amicus curiae* "with full rights of a party" (Pet. 2, 8, n. 2). Because the United States is no longer participating as *amicus*, this issue would appear to be moot unless the United States were dismissed as an intervenor and reinstated as *amicus*. In any event, it was proper for the district court to invite, and permit, the United States to participate as *amicus* with broad rights in order to assist the court in the determination of the complex issues involved here. Cf. *Ex parte Peterson*, 253 U.S. 300, 312-313; *Universal Oil Co.* v. *Root Refining Co.*, 328 U.S. 575, 581; *Faubus* v. *United States*, 254 F.2d 797 (C.A. 8), certiorari denied, 358 U.S. 829.

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